Editor's note: Reconsideration denied by order dated March 17, 1975; Appealed -- settled, Civ. No. A75-111 (D.Alaska May 30, 1980)

GEORGE ONDOLA

IBLA 73-315 B Decided October 29, 1974

Appeal from decision, Alaska State Office, Bureau of Land Management, rejecting Alaska Native allotment application AA 5834.

Modified and Remanded.

1. Alaska: Native Allotments

   An allotment application under the Act of May 17, 1906, must be rejected where it was filed after December 18, 1971, when that Act was repealed by section 18 of the Alaska Native Claims Settlement Act. An amendment filed after December 17, 1971, to an application filed prior to that date must be rejected as not timely filed when it describes completely different land from that described in the original application.

2. Alaska: Native Allotments

   Withdrawn and reserved lands are not open to appropriation under the Alaska Native Allotment Act. No rights may be initiated under the Alaska Native Allotment Act by occupation and use of lands not open to appropriation.

APPEARANCES: George Ondola, pro se; Paul Kirton, Esq., Office of the Solicitor, Department of the Interior.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

In 1969 George Ondola filed Alaska Native allotment application AA 5834(A) pursuant to the provisions of the Alaska Native Allotment Act of May 17, 1906, 43 U.S.C. § 270-1 (1970), for lands

designated herein as Parcel "A." The application recited that appellant had used and occupied the land from 1951 to the present for hunting, fishing and berry-picking, and that the land was previously used and occupied by his grandparents and by his mother for subsistence purposes. Even though he alleged he used and occupied the land each year from May 1 through September 30, he filed a second application for an additional parcel "B," a substantial distance away, alleging use and occupancy commenced in July 1945 and continuing from July to October each year thereafter to the present for "berries, wood, fishing, and hunting." The application covering the parcel "B" was certified by Delores N. Roullier, Bureau of Indian Affairs (BIA), realty specialist, on April 5, 1972, and filed in the Bureau of Land Management (BLM) on April 10, 1972. On August 22, 1972, Roy Peratrovich, Superintendent, Anchorage Agency, BIA, stated that the date of receipt of this application, among others, was in March or April, 1972. On September 5, 1972, Mrs. Roullier stated that the application for parcel "B" had been filed in April 1972. Upon request of BIA, the second application was considered by BLM to be an amendment of the first. Without reference to the date of filing, BLM rejected the application of George Ondola because the lands involved were withdrawn prior to initiation of use and occupancy.

[1] The Alaska Native Allotment Act was repealed on December 18, 1971, by section 18 of the Alaska Native Claims Settlement Act. 43 U.S.C. § 1617 (Supp. II, 1972). But applications including amendments thereof, pending before the Department of the Interior on that date may be processed to patent, all else being regular. The first question before us is whether the April 1972 parcel "B" amendment may be accepted. In this regard the Secretarial Instruction of October 18, 1973, provides as follows:

> Amendments to Application
>
> All amendments to allotment applications must be closely scrutinized. Amendments which result in the relocation of the allotment will not be accepted unless it appears that the original description arose from the inability to properly identify the site on protraction diagrams. Amendments which are designed to claim the commencement of the use and occupancy at an earlier point in time must also be carefully examined and the applicant must establish the reason for the error, his good faith in making the correction, and the applicant must present convincing evidence of the actual use and occupancy at the earlier point in time. (Emphasis added.)

In the instant case appellant sought to add new and different lands to those timely filed for in 1969. The additional lands applied for did not result from an inability to properly identify the parcel in the original application. An attempt to gain additional land by amendment initiated subsequent to the repeal of the Allotment Act is, in effect, a new application. Such application is prohibited by section 18 of the Alaska Native Claims Settlement Act, supra. Accordingly, the parcel "B" amendment of April 1972 must be and is hereby rejected.

Even if the application for parcel "B" was timely filed, as averred in the appeal brief, consideration of the following statement simultaneously made in that brief impels the rejection of the application for that parcel. Appellant, after stating that he was born in 1930, said:

> * * * The Appellant was born on the land covered under Parcel B and used this land in the traditional Native manner first along side his parents, then later on his own for berry picking, hunting, fishing and gathering firewood. Hence on August 1942 the date of withdrawal from appropriation for use of the War Department by Public Land Order 20, this land was and had been used by Appellant for many years. Appellant furnished witness statements certifying his many years use of these lands for subsistence purposes (attached hereto as Exhibits).

This assertion makes clear that appellant claims allotment rights to parcel "B," not by reason of his own use and occupancy in compliance with statute, but rather by reason of prior use and occupancy of his parents. The Board previously considered a similar argument in Larry W. Dirks, Sr., 14 IBLA 401 (1974). We held that an Alaska Native allotment right is personal to one who has fully complied with the law and regulations, that such right is nonalienable, nontransferable, noninheritable, and terminates with death. We specifically held that a native who applies for withdrawn lands must show that he himself complied with the law prior to the date of withdrawal and that he may not avail himself of any period of use and occupancy of his ancestors to establish a right to allotment. Georgianna A. Fischer, 15 IBLA 79 (1974). Nor does the quoted statement modify the representation made by appellant in his application that independent use and occupancy in his individual capacity began in 1945. At that time the land was already

withdrawn by Public Land Order 20; the land has remained closed to private appropriation at all times since then. Furthermore, any assertion that appellant may have initiated independent use and occupancy of the tract when he was but 7 years of age -- 5 years prior to the 1942 withdrawal -- would fly in the face of reason. Helen F. Smith, 15 IBLA 301 (1974).

The decision below recited that the land covered by parcel "A" was withdrawn by Power Project 350 on September 28, 1922, and that it was not until May 20, 1966, that the land was opened by Public Land Order 4022. The opening, however, afforded the State a preference right of selection, which, when exercised within a 90-day period, served to prohibit any private appropriation. The BLM decision rejected parcel "A" because the land had been closed since 1922 and remained closed after 1966 because of a State selection.

[2] If the 1922 powersite served to withdraw the lands, then the decision below must be affirmed. Christian G. Anderson, 16 IBLA 56 (1974). But if the withdrawal of 1922 was for transmission line purposes, the lands would be open subject to section 24 of the Federal Power Act, 43 CFR 2344.2. If the land was open and appellant used and occupied it in accordance with the Allotment Act commencing at a time prior to 1966 and continued in use and occupation even after the State made selection, he would be entitled to allotment subject to section 24 of the Federal Power Act, all else being regular. Lucy E. Ahvakana, 3 IBLA 341 (1971); Archie Wheeler, 1 IBLA 139 (1970).

Therefore, pursuant to the authority delegated by the Secretary of the Interior to the Board of Land Appeals, 43 CFR 4.1, the decision below is modified in accordance with the above. When the case file is returned, the State Director shall inquire further into the status of the land in parcel "A," i.e., whether withdrawn in 1922 and segregated from all further appropriation or whether open under section 24 of the Federal Power Act. If the land was not open, appellant will be informed and the case will be closed. If open under section 24, the allotment application will be processed in accordance with existing practice and all conflicting or adverse claimants (i.e., the State of Alaska if a selection application has been filed, any Native Village or Regional Corporation otherwise entitled to the land or to make selection, and/or

any third parties who assert rights in the land) will be informed and designated as adverse parties.

Douglas E. Henriques
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Joan B. Thompson
Administrative Judge